

United States Senate

WASHINGTON, DC 20510

April 21, 2020

The Honorable William P. Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530

Pat A. Cipollone
Counsel to the President
The White House
1600 Pennsylvania Ave, NW
Washington, DC 20002

Dear Attorney General Barr and Mr. Cipollone:

I am deeply troubled by President Trump's recent assertions that his authority to override states' independent responses to the COVID-19 crisis is "total," and I write to request copies of all documents produced by the Department of Justice and the White House Counsel's Office articulating the legal basis, if any exists, for such sweeping claims of authority. Any such legal opinions or memoranda must not be allowed to operate as a secret body of law and must be disclosed for Congress to assess their fidelity to the U.S. Constitution.

On April 13, 2020, during a briefing with the White House Coronavirus Task Force, President Trump threatened to use his "ultimate authority" to reopen the United States, and claimed that his authority to rescind or override states' independent public health and emergency measures during the COVID-19 pandemic is "total."¹ At the same briefing, Vice President Pence concurred with the President's assertion of total authority, stating that "the authority of the President of the United States during national emergencies is unquestionably plenary."²

These assertions appear to directly contradict both the letter and spirit of the Constitution, and they have been forcefully rejected by legal scholars across the political spectrum.³ They also

¹ *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, White House, (issued April 14, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-25/>. (On April 16, 2020, President Trump abandoned his threat to override the nation's governors on decisions related to when to rescind stay at home orders and reopen businesses, but still claimed that in doing so he was exercising his discretion, stating "we will allow them to do that.")

² *Id.*

³ See, e.g., *Trump says his 'authority is total.' Constitutional experts have 'no idea' where he got that.* The Washington Post, (April 14, 2020), <https://www.washingtonpost.com/nation/2020/04/14/trump-power-constitution-coronavirus/>.

raise serious questions about what legal advice the President and Vice President may have received before publicly asserting almost limitless authority to effectively suspend federalism and overrule state governors and public health officials during a pandemic.

Policies of previous administrations rooted in overbroad and illegal assertions of executive power had been secretly justified by classified Office of Legal Counsel (OLC) memoranda, such as the five OLC opinions on torture, interrogation, and detainee treatment that were later withdrawn, as well as four opinions related to the warrantless wiretapping program known as STELLAR WIND. The fact that Congress and the American public learned about many of these secret OLC opinions – which are binding on the executive branch – only years after they went into effect means that the executive branch was effectively operating under a secret body of law that was in direct conflict with public laws and the Constitution.⁴ That is antithetical to a fundamental premise of American democracy: that all branches of government are bound by the same laws, which in turn are bound by the Constitution.

I assume the President did not make an unprecedented assertion of “total” authority while briefing the American people on the ongoing COVID-19 pandemic without having been informed by his national security staff, the Department of Justice, or the White House Counsel’s Office on the scope and limitations of executive authority during a national emergency. Indeed, when asked about the legal basis for this assertion, President Trump said that his administration would “write up papers” and provide a “legal brief” to explain it.⁵ It is therefore essential that Congress be made immediately aware of, and briefed in detail about, any such executive branch legal memoranda or opinions related to the President’s assertion of “total” authority during a national emergency. To what extent does the administration believe the President is able to override decisions and orders of state governors, and what other limitations, if any, does the Constitution and relevant statutes place on the President’s claimed “total” authority?

To understand the Trump administration’s views on these critical constitutional questions, I request copies of all legal opinions, memoranda, and any other documents produced by the Department of Justice and the White House Counsel’s Office articulating the legal basis, if any exists, for the assertions by both President Trump and Vice President Pence that the President’s authority to override states’ COVID-19 emergency measures is “total” and “plenary.”

Please provide such copies as soon as possible, and no later than May 5, 2020. To the extent that any information must be provided in a classified format, please let my office know and then provide it to the Office of Senate Security.

Thank you for your attention to this matter.

⁴ Alex Abdo, *Selective Disclosure of OLC Opinions Isn’t Enough*, Just Security, (Dec. 20, 2019), <https://www.justsecurity.org/67828/selective-disclosure-of-olc-legal-opinions-isnt-enough/>.

⁵ *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, White House, (issued April 14, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-25/>.

Sincerely,

A handwritten signature in blue ink that reads "Patrick Leahy". The signature is fluid and cursive, with the first name and last name clearly distinguishable.

Patrick Leahy
United States Senator